Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992	))))	MB Docket No. 05-311

COMMENTS OF KNOLOGY, INC.

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TABLE OF CONTENTS

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Knology, Inc. ("Knology") hereby submits its Comments to the Federal Communications Commission ("Commission" or "FCC") in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY

In a March 5, 2007 Report and Order, the Commission limited the demands that local franchising authorities could make on new entrants to the cable market.[1] The Commission hoped to remove unreasonable barriers to entry in order to facilitate competition from new cable competitors.[2] Although this Order did not apply to existing cable franchisees, the Commission also released a Further Notice of Proposed Rulemaking which sought comment on the expansion of these new rules to encompass

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1 *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992,* Report and Order and Further Notice of Proposed Rulemaking, MB Docket No. 05-311, FCC 06-180 (rel. March 5, 2007) ("LFA Report and Order and FNPRM").

2 *Id.* at ¶ 1.

renewal applications by existing cable franchisees. Knology supports the Commission's tentative conclusion to expand the March 2007 rules to cable franchise renewals.[3]

As the Commission describes it, "the record includes only a few hundred examples of competitive franchises, many of which were obtained after months of unnecessary delay."[4] Knology is one of those few cable television competitors and its competitive entry generates greater choice and increased savings for residents in its markets.[5] The record contains evidence of one market from which Knology withdrew because of the local franchising authority's ("LFA's") unreasonable demands.[6] Knology has encountered unreasonable LFA demands in other markets, particularly in the context of renewals. In the case of franchise renewals, Knology already has sunk considerable investment in the local market. Consequently, the LFAs often believe that they can demand more of Knology. Knology offers the cases of Montgomery, Alabama and Hunstville, Alabama as examples of local franchise renewal negotiations in which the LFA is making demands that would be unlawful under the Commission's recently adopted rules if Knology were a new entrant. These cases underscore the importance of extending existing rules governing cable franchise requirements to include renewals of existing franchises.

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[3] *Id.* at ¶ 140.

[4] *Id.* at ¶ 19.

[5] *See, e.g., id.* at ¶ 50 (noting that in Pinellas County, Florida, where Knology is the competitive cable operator, the incumbent cable operator's monthly rates are $10-$15 lower than in neighboring counties where it lacks competition).

[6] *Id.,* n.361 ("Knology declined to enter the Louisville market after the Louisville LFA requested a PEG grant of $266,000 at the time of franchise grant").

II. THE COMMISSION SHOULD EXTEND ITS RULES TO FRANCHISE RENEWALS NOT ONLY TO PROMOTE FUTURE COMPETITION, BUT ALSO TO PRESERVE EXISTING COMPETITION.

As the Commission considers the extension of its rules to include existing cable franchisees, it should remain aware that this involves more than just a consideration of the relative needs of incumbent cable operators and competitive new entrants. Knology occupies a position in the middle. It is a competitor of the incumbent cable operator and its competitive influence has resulted in better services and lower rates for consumers in its local franchise areas. However, although Knology is a competitor, it already has existing cable franchises. A failure to extend the local franchise rules to existing cable franchisees could lessen or eliminate the competitive pressure already being exerted by Knology. The record establishes that Knology's market presence benefits consumers and logically leads to the conclusion that Knology's exit from a local market because of unreasonable LFA demands would harm consumers in that market. The adoption of rules to govern LFA negotiations for cable franchise renewal would preserve or enhance Knology's competitive influence to the ultimate benefit of consumers.

Knology supports the extension of the Commission's rules to all cable franchise renewals. However, the extension is particularly important in local markets where there is a competitive cable operator already providing service. In the context of cable rates, an FCC finding of effective competition in a market alters the LFA's authority over cable television rates for that area.[7] The underlying rationale for eliminating LFA regulation of cable rates is that a competitive market does a better job than government regulation of

[7] 47 U.S.C. § 543(a)(2).

reflecting consumer preferences and "regulating" to the benefit of consumers.[8] Where a better and more efficient "regulator" becomes available through competition, the less effective means of regulation are lifted.

At a minimum, the same rationale should affect the consideration of what are reasonable LFA demands. Certain franchise requirements, such as build-out requirements, may be warranted when no other incentive exists to accomplish the same goal (*i.e.*, when there are no competitive pressures). However, the market entry of a competitive cable television operator changes the incentives of the incumbent. Therefore, the reasonableness of local franchise requirements depends, to some degree, on whether the incumbent cable operator faces pressures from a competitive cable operator.

Again, Knology supports the extension of the current rules to all cable franchise renewals, whether or not a competitor serves the market. However, where competitive pressures in a market exist, it becomes particularly important to limit the LFA's authority to impose unreasonable franchise requirements when a cable company seeks to renew its existing franchise. Therefore, at a minimum, the cable franchise rules recently adopted by the Commission should be extended to apply to franchise renewals where there is more than one cable operator in the local franchise area. This will further the Commission's goal of enhancing competition in the provision of cable television services and will avoid skewing the competitive landscape with different regulatory schemes, but

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[8] *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation*, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631 at n.25 (1993) ("the statute implicitly finds no need for regulation of rates of systems subject to effective competition because the presence of competition prevents them from exercising undue market power").

will preserve local franchise authority where its exercise may be most needed to protect consumers.

III. SOME LOCAL FRANCHISE AUTHORITIES SEEK TO IMPOSE UNREASONABLE REQUIREMENTS IN THE CONTEXT OF CABLE FRANCHISE RENEWALS.

Some local franchise authorities continue to insist on unreasonable franchise requirements in renewal negotiations even after the release of the Commission's Report and Order in this proceeding. Thus, it is critical that the Commission apply its requirements in the context of renewing existing cable television franchises, as described in further detail herein.

A. Time Limits for Renewal Negotiations

The *Report and Order* cited unreasonable delays as one justification for the new rules. According to the Report and Order, "many new entrants have been subjected to lengthy, costly, drawn-out negotiations that, in many cases, are still ongoing."[9] The Commission concluded that "unreasonable delays in the franchising process can deprive consumers of competitive video services [and] hamper accelerated broadband deployment . . . ."[10] The Commission explained that delays are especially unreasonable when an applicant already has access to public rights-of-way and concluded that "entities with existing authority to access rights-of-way should be entitled to an expedited process, and that lengthy consideration of franchise applications made by such entities would be unreasonable."[11]

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9 LFA Report and Order and FNPRM at ¶ 22.

10 *Id.* at ¶ 67.

11 *Id.* at ¶ 70.

The statute seeks to eliminate the problem of delays in the context of franchise renewals, as well. The Communications Act allows four months for renewal decisions[12] after the completion of a needs assessment and a performance review (which itself must not take more than six months), but only if a request for the needs assessment and performance review is made during the 6-month period which begins with the 36th month before franchise expiration.[13] However, the statute is silent on the time limit for an LFA to reach a renewal decision in the event that the request for the needs assessment and performance review is not made within the time frame established in Section 626(a)(1). In light of the statutory silence, the Commission should find it to be unreasonable for renewal decisions to take longer than four months from the date of a renewal request, regardless of when that renewal request is made.[14] As with initial franchises, if an LFA has not reached a final decision within the time limit allowed, the LFA should be deemed to have granted an interim renewal based on the terms proposed in the renewal request.[15]

Knology has experienced considerable delay in franchise renewal in Montgomery, Alabama and Huntsville, Alabama. In both locations, neither Knology nor the LFA requested a needs assessment and performance review within the time period established by Section 626(a)(1). As a result, there is no statutory time limit to govern renewal negotiations in those two locations and delay has ensued.

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12 47 U.S.C. § 546(c)(1).

13 47 U.S.C. §§ 546 (a)(1) and (a)(2).

14 *See National Cable & Telecommunication Ass'n v. Gulf Power Co.*, 534 U.S. 327, 339 (2002) ("[A]s a general rule, agencies have authority to fill gaps where the statutes are silent.") (citation omitted).

15 LFA Report and Order and FNPRM at ¶ 77.

Knology has been in renewal negotiations with the Montgomery LFA for over two years without a resolution (since February 2005). Similarly, the renewal negotiations with the Huntsville LFA have been ongoing for nearly three years (since June 2004). Knology continues to serve customers in those markets and neither LFA has sought the removal of Knology's facilities from the public rights-of-way. However, the inability to renew these franchises in a timely fashion creates an uncertainty that can increase the costs of securing financing for broadband network construction and upgrades.

B. Unreasonable Build-Out Requirements

Requirements that franchisees construct their networks in an uneconomic fashion or pursuant to overly aggressive time tables arise not only in the context of initial franchise negotiations, but also in negotiations for franchise renewal. This problem is particularly acute in those cities that are continuing to expand geographically. The Commission's Report and Order elaborated on some of the harmful effects of unreasonable build-out requirements. The Department of Justice "noted that imposing uneconomical build-out requirements results in less efficient competition and the potential for higher prices."[16] The Commission concluded that "build-out requirements imposed by LFAs can constitute unreasonable barriers to entry for competitive applicants"[17] and may "contravene the goals of Section 706 of the Telecommunications Act of 1996, which requires the Commission to 'remov[e] barriers to infrastructure

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16 *Id.* at ¶ 36 (citing DOJ *Ex Parte* at 13).

17 *Id.* at ¶ 40.

investment' to encourage the deployment of broadband services 'on a reasonable and timely basis.'"[18]

Knology has encountered unreasonable build-out demand in local franchise renewal negotiations. For example, the City of Huntsville seeks to require Knology to provide service to parts of the franchise area where it would be inordinately expensive to extend the Knology network. These areas of Huntsville are extremely rocky. The incumbent cable operator, the incumbent telephone company and the electric utility built into these areas at the same time (when they were all monopoly providers of their respective services in these areas) and jointly buried their facilities underground before Knology began its Huntsville network upgrade/rebuild. Constructing a network in these areas would be prohibitively expensive. Under these conditions, the cost to build a mile of plant, all inclusive, is approximately $100,000 per mile. That cost would not be shared with any other entities and it would have to be recovered by competing with an incumbent cable operator for a limited set of customers. Knology estimates that the installed cost per subscriber in these areas will be around $8,000 to $10,000, which is too expensive to make it an economically feasible enterprise. Yet the city requires that Knology construct its network to serve these areas as a condition of renewal.

Whether a build-out requirement is unreasonable may sometimes depend on the specific circumstances. However, Knology urges the Commission to find that section 621(a)(1)'s prohibition on a LFA's refusal to award a competitive franchise because the

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[18] *Id.* at ¶ 41 (citing Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt.).

franchisee will not agree to unreasonable build-out requirements applies to the award of franchise renewals.[19]

C. Franchise Fees

The Commission concluded that it would be unreasonable for a LFA to refuse to grant a competitive franchise because of an applicant's refusal to accede to impermissible franchise fee demands.[20] The Commission expects that existing franchisees and LFAs would address discrepancies between a LFA's assessment of franchise fees and the Commission's determination of what franchise fees are reasonable during the next franchise renewal negotiation period.[21] The Commission confirms that a franchise authority may not assess franchise fees on non-cable services,[22] such as broadband data and telephone services. In addition, non-incidental franchise-related costs required by LFAs must count toward the 5 percent franchise fee cap and the Commission has determined that the term "incidental" costs are limited to those listed in Section 622(g)(2)(D) (as well as some other minor expenses).[23]

During the renewal process, LFAs have sought to assess franchise fees on revenues derived from non-cable services. For example, when Knology offers a discount to consumers on bundled cable, telephone and Internet, the City of Montgomery, Alabama considers the discount to apply uniformly across all three services. It is

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19 *See id.* at ¶ 91.

20 *See id.* at ¶ 94.

21 *Id.*

22 *Id.* at ¶ 98 (citing *Inquiry Concerning High Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, 4851 (2002)).

23 *Id.* at ¶ 103.

inappropriate for a local franchising authority to regulate marketing discounts and to dictate how they are applied among cable, telephone, and broadband data services.

Knology also has encountered unreasonable attempts by LFAs to exclude charges and in-kind services from the 5 percent cap during the course of franchise renewal negotiations. For example, the City of Montgomery seeks the payment of $0.25 - $1.00 per subscriber per month from Knology for "Educational and Governmental Access capital support" for access facilities and equipment that would be characterized as not being attributable toward the 5 percent cap. It requests free cable drops, free basic and expanded basic cable to all city buildings, fire stations, educational facilities and community centers. It also requests free cable modem service for all public schools and library branches. Similarly, the City of Huntsville seeks to require Knology to provide free cable television and free cable modem services to city buildings including the City of Huntsville Sportsplex, public schools, religious and private schools such as Holy Spirit School, and laudable but nevertheless private entities such as the American Red Cross, the Chamber of Commerce, United Cerebral Palsy and Big Spring Nursing Home. The costs of providing those free services would not be attributed to Knology's 5 percent franchise fee. Montgomery's needs assessment also encourages the city to obtain overlashing rights and dark fiber from Knology and Huntsville's draft ordinance seeks the city's free use of any poles or "other wire-holding structures" of Knology.

Disputes over what is included in the calculation of cable revenues and what expenditures are attributable to the 5 percent cap are a considerable source of disagreement in franchise renewal negotiations. Knology strongly urges the Commission to clarify that the calculation of revenues and the 5 percent cap must be performed in compliance with the conclusions reached in the Report and Order.

D. Other Unreasonable Demands

The prevalence of other unreasonable demands during the franchise renewal process by LFAs provides another reason to extend the new rules so that they apply equally to existing competitive cable franchisees. As noted above, both the Montgomery and Huntsville LFAs have demanded that Knology construct free network connections and provide free cable television service to numerous city buildings, schools, libraries, fire stations, and other organizations. It is particularly unreasonable, though, that these LFAs also demand that Knology construct free network connections and provide free cable service to non-municipal facilities, such as a religious school and the American Red Cross. In addition to free network construction and service, the LFAs demand free converters at each building. Montgomery also demands that Knology provide additional two-way connections to certain municipal and non-municipal institutions, including all accredited private schools, Alabama State University, Auburn University Montgomery, and Troy University. Moreover, the LFAs in Montgomery and Huntsville demand that Knology provide free and/or discounted cable modem service to municipal and non-municipal buildings.

These demands for free installation, free cable service, free two-way connections, and free cable modem service are unreasonable and would be unacceptable under the new rules. As an initial matter, the cities do not propose to impute the cost of these free services to the 5 percent franchise fee cap. Essentially, they seek to take funds from Knology that could be used for constructing networks and providing lower cost services to inhabitants of their own cities. Moreover, they are requiring Knology to provide services that are not cable services (*i.e.*, cable modem services) and are unrelated to the provision of cable services. The Commission has stated that "any requests made by LFAs that are unrelated to the provision of cable services by a new competitive entrant are subject to the statutory 5 percent franchise fee cap."[24] Demands for free installations and free service to private or non-municipal entities are unrelated to the establishment or operation of a cable system. It is unreasonable for the cities of Huntsville and Montgomery to make such demands without imputing the costs of those connections and services to the 5 percent franchise fee cap.

The Montgomery LFA also wants Knology to agree to provide up to three local PEG channels at no charge. Section 611(b) allows an LFA to require designated PEG channel capacity, but does not define the extent of such capacity.[25] Section 621(a)(4)(b) allows the LFA to ensure that the cable operator will provide "adequate" PEG access channel capacity.[26] The Commission offered guidance on the definition of "adequate" to mean "satisfactory or sufficient," and not "significant."[27] Demanding a number of PEG channels that is greater than the number of channels that the community is using at the time of the application is more than "satisfactory or sufficient" and, consequently, is more than is required by the statute.[28] Montgomery uses only a single PEG channel; it cannot reasonably require Knology to provide two additional PEG channels.

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24 *Id.* at ¶ 105.

25 *Id.* at ¶ 112, citing 47 U.S.C. §531(b).

26 47 U.S.C. § 541(a)(4)(B).

27 *Id.* at ¶ 112.

28 *Id.* at ¶ 114.

LFAs sometimes view franchise renewals as opportunities to compile extensive wish-lists that include many items unrelated to the provision of cable services or reasonable management of the public rights-of-way. Their insistence on these items unreasonably extends the period before renewal can be secured and can dramatically increase the cost of providing service to a city. The cities, not the cable operators, should bear the costs of meeting these unreasonable demands. The Commission should clarify that the costs of requirements, such as those mentioned above, that are unrelated to the provision of cable services are subject to the statutory 5 percent franchise fee cap whether they are imposed as part of an initial franchise or during renewal of an existing franchise.

IV. CONCLUSION

In its Local Franchising Report and Order, the Commission adopted rules designed to remove barriers to entry in the competitive provision of cable television services. As a competitive cable operator, Knology respectfully requests that the Commission apply those rules to renewals of existing franchises to preserve existing and future competition in the provision of cable television services.

Respectfully submitted,

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